

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MICHAEL E. ELLER )  
Petitioner, )  
v. )  
LUIS SPENCER, Superintendent, )  
Respondent. )  
)

Civil Action No. 05-10740-DPW

**RESPONDENT'S MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS CORPUS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the respondent, Luis Spencer, respectfully submits this motion to dismiss the petition for writ of habeas corpus filed by the petitioner, Michael E. Eller, on the grounds that the petition fails to state a claim upon which relief may be granted. In support of this motion, and as is set forth more fully in the accompanying memorandum of law, the respondent states that the petitioner has failed to exhaust the claims stated in his petition for a writ of habeas corpus. Specifically, the petitioner has not presented the claims he now asserts to the Massachusetts Supreme Judicial Court. Because the petitioner has not yet provided the state's highest court with the first opportunity to pass on the merits of these claims, the petition should be dismissed. 28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).<sup>1</sup>

<sup>1</sup> Respondent's remaining defenses are not addressed here because the doctrine of exhaustion mandates dismissal of the petition. In the event that this Court declines to dismiss the petition due to failure to exhaust, the respondent reserves the right, and requests the opportunity, to file an answer and assert all other applicable defenses.

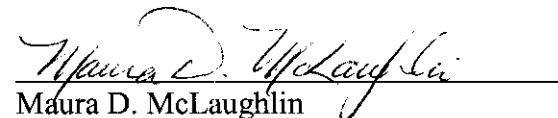
WHEREFORE, the respondent respectfully requests that this Court dismiss this habeas petition on the grounds that it contains unexhausted claims.

Respectfully submitted,

LUIS SPENCER,

By his attorneys,

THOMAS F. REILLY  
ATTORNEY GENERAL

  
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Dated: May 11, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2005, I caused a copy of the above document to be served by first-class mail, postage prepaid, upon the *pro se* petitioner, Michael E. Eller, MCI-Norfolk, P.O. Box 43, Norfolk, Massachusetts 02056.

  
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Maura D. McLaughlin